CapAsia Solar One Ltd v Sun Energy Ventures Holdings (Labuan) Ltd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCC-329–07 OF 2020
LIZA CHAN JC
12 JUNE 2021

Civil Procedure — Summary judgment — Application for summary judgment — Whether there was inordinate delay in filing application — Whether there were triable issues — Whether summary judgment ought to be granted — Rules of Court 2012 O 14

This was an application ('encl 57') made by the plaintiff pursuant to O 14 of the Rules of Court 2012 ('the ROC') for summary judgment against the first, second, fifth, sixth and seventh defendant jointly and severally for the sum of USD25,600,347 and interest at the rate of 15%pa from the date of judgment until full and final payment. The plaintiff further prayed for summary judgment against the fifth, sixth and seventh defendant for specific performance of cl 3.7 of the memorandum of deposit of shares dated 27 May 2013 entered between the plaintiff and the fifth and sixth defendants respectively in favour of the plaintiff and for an order that the fifth and sixth defendants execute the share transfer forms within fourteen days from the date of the order and all of their shares in the second defendant to the plaintiff. The plaintiff also prayed for summary judgment against the fifth and seventh defendants for specific performance of cl 3.7 of the memorandum of deposit of shares dated 25 November 2013 entered between the plaintiff and the fifth and seventh defendants respectively in favour of the plaintiff and for an order that the fifth and seventh defendants execute the share transfer forms within fourteen days from the date of the order and all of their shares in the second defendant to the plaintiff. The background of the case was that the first defendant was a wholly owned subsidiary of the second defendant. The second defendant formed various intermediate holding companies ('IHCs') which in turn were the registered and beneficial owners of 52% or more voting shares in each of six project companies whilst the third defendant was an IHC and was at all material times, wholly owned by the second defendant. The third defendant held 52% ordinary shares as well as preference shares in each of three project companies namely Silverstar Pavilion Sdn Bhd, Corporate Season Sdn Bhd and Fortune 11 Sdn Bhd ('KLIA Projects'). The fourth defendant was a holding company that held interest in non-KLIA projects. The fifth defendant was a director of the first defendant. The fifth and sixth defendants were both directors of the second to fourth defendants and were registered and beneficial owners of 100% of the voting rights in the second defendant. The fifth and

A sixth defendants effectively had management and/or conduct and/or control of the first, second, third and fourth defendants. The seventh defendant was a shareholder of the fourth defendant. The project companies were holders of feed-in approval granted by the Sustainable Energy Development Authority for various solar power generation projects in Malaysia and required equity
B funding for the purposes of the projects. The plaintiff provided the equity funding for the projects on the terms of the master investment agreement dated 27 March 2013 ('the MIA') executed between the plaintiff and the first defendant as amended and restated on 26 November 2013 via a first supplemental agreement dated 25 November 2013 issued by the first
C defendant where: (a) the plaintiff subscribed for note certificates to be issued by the first defendant under a multi-investment programme amounting to USD20.040m; (b) the first defendant would then use the proceeds to subscribe for redeemable preference shares issued by the IHCs or grant loans to the IHCs; and (c) the IHCs would in turn utilise the proceeds from the redeemable
D preference shares and/or loan to acquire economic rights in the project companies. In return for subscribing for the notes certificates: (i) the second defendant signed a guarantee and indemnity in favour of the plaintiff dated 27 May 2013 which was amended and supplemented by the first supplemental deed dated 25 November 2013 and second supplemental deed dated 14
E September 2016; and (ii) the fifth to seventh defendants executed memorandum of deposit of shares in respect of their respective shares in the second and fourth defendants in favour of the plaintiff. Via the said memorandum, the plaintiff had: (A) security over all the ordinary shares of the second and fourth defendants; (B) indirect interest in the second defendant's
F 100% shareholding in the third defendant; and (C) indirect interest in the fourth defendant's interest in several project companies that held the feed-in approval for solar power generation projects in Malaysia. The plaintiff then filed this suit against the first, second, fifth, sixth and seventh defendants. In resisting the summary judgment, the defendants' contentions in essence were
G that the memorandum of understanding dated 21 February 2017 ('MOU') had novated and/or varied the terms of the MIA whereby a trial was necessary to determine based on the examination of documentary and oral evidence, whether or not the plaintiff had in fact breached the MIA as varied by the MOU and whether its own breaches of the same, had induced the defendants
H to breach the MIA and subsequently the dilution of shares as referred to by the plaintiff could no longer constitute a breach as the dilution has been remedied by the consent order dated 28 August 2020 and subsequently by the order dated 8 January 2021. The defendants contended that the plaintiff was estopped by its conduct from seeking summary judgment based on the MIA as
I it was unconscionable for the plaintiff to insist on its strict legal rights under the MIA after the defendants had conducted its affairs in view of the agreement between the plaintiff and the defendants to sell the KLIA assets to Taliworks, and that there was an unexplained delay in the plaintiff's filing of encl 57. The plaintiff rebutted that the MOU was never intended to novate or vary the terms

of the MIA as it was not legally binding. The said MOU, according to the plaintiff by its very text, was intended to be merely a plan for the fifth, sixth and seventh defendants to implement a strategy and possible avenues to amicably exit the relationship between the defendants and the plaintiff. The plaintiff further contended that the sale of the KLIA assets to Taliworks or indeed to any other party was one of the avenues or options for the defendant to partially repay the MIA facility, estoppel was not applicable and the delay was no ground for defeating the plaintiff's right to summary judgment under O 14 when there was no real defence disclosed. The issues to be determined were whether the preliminary requirements for an application under O 14 had been met and whether the defendants had raised an issue of fact and/or law to be tried.

Held, dismissing the application with costs:

(1) The court found that delay did not defeat the summary judgment application as there was no solid basis to the complaint of inordinate delay on the plaintiff's part in moving the court (see para 35).

(2) The court held that whether the plaintiff could still rely on a breach of the MIA due to the dilution of shares on the facts of the present case, was an issue of fact and law which should be decided at a full trial. A consent order was akin to a contract with superadded command of the court. It was therefore triable whether the plaintiff was estopped from or entitled to resurrect the merits of the said breach of the MIA that was entombed in the consent order (see para 37).

(3) As to whether the MOU dated 21 February 2017 had novated and/or varied the terms of the MIA, the court found that the true nature and purport of the MOU ought to be determined at trial as parties were not just bound by the label affixed onto it. The circumstances disclosed on this case concerning the MOU called for further investigation. The assertions made by the defendants when taken objectively, may well be relevant and warrant investigation at trial (see paras 38–39).

(4) There was evidence to show that the defendants had with the plaintiff's approval, sold the KLIA assets to Taliworks and assigned the proceeds to the plaintiff but whether the sale of the KLIA assets and negotiations may have caused the defendants to be misled into believing a different state of affairs was triable. As for the claim against the fifth, sixth and seventh defendants, it was the court's respectful view that cl 13.1 of the memorandum of deposit of shares was not a stand-alone clause and had to be construed together with the rest of the provisions in the memorandum of deposit. The memorandum of deposit as such, was to be read as a whole, and effect must be given to the clear intention and bargain made between the parties as contained therein (see paras 40–41 & 43).

(5) For the reasons enumerated above, this was not such a plain and straightforward case for summary judgment to be entered. In was the court's view that the defendants had succeeded to achieve the low threshold to resist summary judgment as they need only raise one triable issue to be given leave to defend. The court was further satisfied that there were circumstances in the facts that constituted 'some other reason for trial' within the scope of O 14 r 3(1) of the ROC. On the totality of the evidence before the court, the issues raised by the defendants required close investigation, and in the interest of justice, this was a fit and proper case for which there ought to be a trial to determine the plaintiff's claim (see paras 44–46).

[Bahasa Malaysia summary

Ini adalah permohonan ('lampiran 57') yang difailkan oleh plaintif mengikut A 14 Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') untuk penghakiman terus terhadap defendan pertama, kedua, kelima, keenam dan ketujuh secara bersama dan beberapa kali bagi jumlah AS$25,600,347 pada kadar 15% setahun dari tarikh penghakiman sehingga bayaran penuh dan akhir. Plaintif seterusnya memohon penghakiman terus terhadap defendan kelima, keenam dan keenam menurut klausa 3.7 memorandum deposit saham bertarikh 27 Mei 2013 yang dimeterai antara plaintif dan defendan kelima dan keenam yang memihak kepada plaintif dan bagi perintah bahawa defendan kelima dan keenam melaksanakan borang pemindahan saham dalam tempoh empat belas hari dari tarikh perintah tersebut. Plaintif juga memohon penghakiman terus terhadap defendan kelima dan ketujuh menurut klausa 3.7 memorandum deposit saham bertarikh 25 November 2013 yang dimeterai antara plaintif dan defendan kelima dan ketujuh yang memihak kepada plaintif dan bagi perintah bahawa defendan kelima dan ketujuh melaksanakan borang pemindahan saham dalam tempoh empat belas hari dari tarikh perintah dan semua saham mereka dalam defendan kedua kepada plaintif. Latar belakang kes ini adalah defendan pertama adalah anak syarikat milik penuh defendan kedua. Defendan kedua menubuhkan pelbagai syarikat induk pertengahan ('IHC') yang seterusnya adalah pemilik berdaftar dan bermanfaat sebanyak 52% atau lebih saham mengundi dalam setiap enam syarikat projek manakala defendan ketiga adalah IHC dan pada setiap masa material, dimiliki sepenuhnya oleh defendan kedua. Defendan ketiga memegang 52% saham biasa serta saham keutamaan dalam setiap tiga syarikat projek iaitu Silverstar Pavilion Sdn. Bhd., Corporate Season Sdn. Bhd. dan Fortune 11 Sdn. Bhd. ('KLIA Projects'). Melalui memorandum tersebut, plaintif mempunyai: (A) jaminan ke atas semua saham biasa defendan kedua dan keempat; (B) kepentingan tidak langsung dalam 100% pegangan saham defendan kedua dalam defendan ketiga; dan (C) kepentingan tidak langsung dalam kepentingan defendan keempat dalam beberapa syarikat projek yang memegang kelulusan suapan untuk projek penjanaan tenaga solar di Malaysia. Plaintif kemudian memfailkan saman ini terhadap defendan pertama, kedua, kelima, keenam dan

ketujuh. Dalam membantah penghakiman ringkasan, perbalahan defendan pada dasarnya adalah bahawa memorandum persefahaman bertarikh 21 Februari 2017 ('MOU') telah noved dan/atau syarat-syarat MIA diubah di mana perbicaraan adalah perlu untuk meneliti keterangan dokumentari dan keterangan lisan, sama ada plaintif sebenarnya telah melanggar MIA seperti yang diubah oleh MOU dan sama ada pelanggarannya sendiri yang sama, telah mendorong defendan untuk melanggar MIA dan seterusnya penjualan saham seperti yang dirujuk oleh plaintif tidak lagi boleh menjadi pelanggaran kerana penjualan saham telah dipersetujui oleh perintah persetujuan bertarikh 28 Ogos 2020 dan seterusnya melalui perintah bertarikh 8 Januari 2021. Defendan-defendan berhujah bahawa plaintif telah dihalang oleh tindakannya daripada mendapatkan penghakiman terus berdasarkan MIA kerana ianya tidak dapat disangkal oleh plaintif untuk melaksanakan hak undang-undangnya di bawah MIA selepas defendan telah menjalankan urusannya memandangkan perjanjian antara plaintif dan defendan untuk menjual aset KLIA kepada Taliworks, dan bahawa terdapat kelewatan yang belum dijelaskan dalam pemfailan plaintif di lamp 57. Plaintif menafikan bahawa MOU tersebut tidak pernah bertujuan untuk mengubah terma MIA kerana ianya tidak mengikat secara sah. MOU tersebut, menurut plaintif melalui hujahannya, bertujuan untuk hanya menjadi rancangan bagi defendan kelima, keenam dan ketujuh untuk melaksanakan strategi dan kemungkinan jalan keluar dari hubungan antara defendan dan plaintif. Plaintif juga menegaskan bahawa penjualan aset KLIA kepada Taliworks atau mana-mana pihak lain adalah salah satu saluran atau pilihan bagi defendan untuk membayar sebahagian kemudahan MIA, estoppel adalah tidak terpakai dan kelewatan tersebut bukan alasan untuk mengalahkan hak plaintif untuk merumuskan penghakiman di bawah A 14 apabila tiada pembelaan sebenar. Isu-isu yang akan ditentukan adalah sama ada keperluan awal bagi permohonan di bawah A 14 telah dipenuhi dan sama ada defendan telah membangkitkan isu fakta dan/atau undang-undang yang akan dibicarakan.

Diputuskan, menolak permohonan dengan kos:

(1) Mahkamah mendapati bahawa kelewatan tidak mengalahkan permohonan penghakiman terus kerana tiada alasan yang kukuh untuk menyokong alasan kelewatan tersebut (lihat perenggan 35).

(2) Mahkamah berpendapat bahawa sama ada plaintif masih boleh bergantung kepada pelanggaran MIA kerana penjualan saham menurut fakta kes adalah isu fakta dan undang-undang yang perlu diputuskan di dalam perbicaraan penuh. Perintah persetujuan adalah seperti kontrak. Oleh itu, sama ada plaintif telah diestop atau berhak untuk membangkitkan semula merit pelanggaran MIA tersebut telah ditermakan di dalam perintah persetujuan (lihat perenggan 37).

(3) Sama ada MOU bertarikh 21 Februari 2017 telah diubahsuai dan/atau

terma MIA diubah, mahkamah mendapati bahawa objektif MOU tersebut sepatutnya ditentukan di dalam perbicaraan kerana pihak-pihak tidak hanya terikat dengan MOU tersebut. Keadaan berkaitan dengan MOU tersebut terbuka untuk siasatan lanjut. Dakwaan defendan apabila diambil secara objektif, mungkin relevan dan seharusnya ditentukan di dalam perbicaraan penuh (lihat perenggan 38–39).

(4) Terdapat bukti yang menunjukkan bahawa defendan-defendan telah mendapat kelulusan plaintif, menjual aset KLIA kepada Taliworks dan menyerahkan hasil jualannya kepada plaintif. Namun, sama ada penjualan aset dan rundingan KLIA mungkin menyebabkan defendan dikelirukan untuk mempercayai keadaan lain yang mana perkara ini perlu dibicarakan. Bagi tuntutan terhadap defendan kelima, keenam dan ketujuh, mahkamah ini berpendapat bahawa klausa 13.1 memorandum deposit saham bukanlah klausa tunggal dan perlu ditafsirkan bersama dengan peruntukan lain di dalam memorandum deposit. Memorandum deposit tersebut hendaklah dibaca secara keseluruhan, dan kesannya mesti diberikan kepada niat yang jelas dan berdasarkan rundingan yang dibuat antara kedua pihak (lihat perenggan 40–41 & 43).

(5) Atas sebab-sebab yang dinyatakan di atas, ini bukan kes yang biasa dan mudah kes penghakiman terus. Mahkamah berpendapat bahawa defendan-defendan telah berjaya mempunyai merit untuk membantah penghakiman terus kerana defendan-defendan hanya perlu membangkitkan satu isu yang boleh dibicarakan di dalam pembelaannya. Mahkamah juga berpuas hati bahawa terdapat keadaan dalam fakta-fakta yang merupakan 'beberapa sebab lain untuk perbicaraan' dalam skop A 14 k 3(1) KKM 2012. Berdasarkan keterangan, isu-isu yang dibangkitkan oleh defendan memerlukan penelitian yang teliti, dan demi kepentingan keadilan, ianya sesuai dan wajar untuk perbicaraan penuh untuk menentukan tuntutan plaintif (lihat perenggan 44–46).]

Cases referred to

Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382, SC (folld)

Aura Indah Jaya Sdn Bhd v OCBC Bank (M) Bhd [2021] 10 MLJ 21; [2021] MLJU 191; [2021] 5 CLJ 24, HC (refd)

Bank Negara Malaysia v Mohd Ismail Ali Johor & Ors [1992] 1 MLJ 400, SC (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

Jacobs v Booth Distillery Co [1901] 85 LT 262, HL (refd)

Kheamhuat Holdings Sdn Bhd v The Indian Association, Penang [2006] 6 MLJ 656, CA (distd)

Miles v Bull [1968] 3 All ER 632, QBD (refd)

National Company For Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300, FC (folld)
Perkapalan Shamelin Jaya Sdn Bhd & Anor v Alpine Bulk Transport New York [1997] 3 MLJ 818; [1998] 1 CLJ 424, CA (folld)
Société Italo-Belge pour le Commerce et l'Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd The Post Chaser [1982] 1 All ER 19, QBD (refd)
South East Asia Insurance Bhd v Kerajaan Malaysia [1996] MLJU 642; [1998] 1 CLJ 1045, CA (refd)
Southern Finance Bhd (fomerly known as United Merchant Finance Bhd) v Sun City Development Sdn Bhd & Anor [2006] 6 MLJ 673; [2006] 7 CLJ 464, HC (refd)
Tan Geok Lan v La Kuan @ Lian Kuan [2004] 3 MLJ 465, FC (refd)
United Malayan Banking Corporation Berhad v Palm & Vegetable Oils (M) Sdn Bhd & Ors [1983] 1 MLJ 206, FC (refd)
Voo Min En & Ors v Leong Chung Fatt [1982] 2 MLJ 241, FC (refd)

Legislation referred to

Rules of Court 2012 O 14, O 14 r 3(1), O 81

Alvin Julian (Wong Teck Fung with him) (Zaid Ibrahim & Co) for the plaintiff.
David Morais (R Rishi, Joshua Kong and Pavitra Pillai with him) (Rishi & Partners) for the defendant.

Liza Chan JC:

[1] The application in encl ('encl') 57 was made by the olaintiff for pursuant to O 14 of the Rules of Court 2012 ('the ROC 2012') for:

(1) summary judgment against the first defendant, the second defendant, the fifth defendant, the sixth defendant and the seventh defendant jointly and severally for:

(a) the sum of USD25,600,347; and

(b) interest on the sum of USD25,600,347 at the rate of 15%pa from the date of judgment until full and final payment.

(2) summary judgment against the fifth defendant, the sixth defendant and the seventh defendant according to the following terms:

(a) specific performance of cl 3.7 of the memorandum of deposit of shares between the plaintiff and the fifth defendant dated 27 May 2013 in favour of the plaintiff and an order that:

(i) the fifth defendant do execute the share transfer forms within fourteen days from the date of this order to transfer any and

all of his shares in the second defendant to the plaintiff; and

(ii) in the event the fifth defendant fails to comply with the order in sub-para (a)(i), the plaintiff shall be entitled forthwith to exercise all such powers accorded in the powers of attorney granted to the plaintiff by the fifth defendant under the memorandum of deposit of shares.

(b) specific performance of cl 3.7 of the memorandum of deposit of shares dated 27 May 2013 between the plaintiff and the sixth defendant in favour of the plaintiff and an order that:

(i) the sixth defendant do execute the share transfer forms within fourteen days from the date of this order to transfer any and all of her shares in the second defendant to the plaintiff; and

(ii) in the event the sixth defendant fails to comply with the order in sub-para (b)(i), the plaintiff shall be entitled forthwith to exercise all such powers accorded in the powers of attorney granted to the plaintiff by the fifth defendant under the memorandum of deposit of shares.

(c) specific performance of cl 3.7 of the memorandum of deposit of shares dated 25 November 2013 between the plaintiff and the fifth defendant in favour of the plaintiff and an order that:

(i) the fifth defendant do execute the share transfer forms within 14 days from the date of this order to transfer any and all of his shares in the fourth defendant to the plaintiff; and

(ii) in the event the fifth defendant fails to comply with the order in sub-para (c)(i), the plaintiff shall be entitled forthwith to exercise all such powers accorded in the powers of attorney granted to the plaintiff by the fifth defendant under the memorandum of deposit of shares.

(d) specific performance of cl 3.7 of the memorandum of deposit of shares between the plaintiff and the seventh defendant dated 25 November 2013 in favour of the plaintiff and an order that:

(i) the seventh defendant do execute the share transfer forms within 14 days from the date of this order to transfer any and all of her shares in the fourth defendant to the plaintiff; and

(ii) in the event the seventh defendant fails to comply with the order in sub-para (d)(i), the plaintiff shall be entitled forthwith to exercise all such powers accorded in the powers of attorney granted to the plaintiff by the seventh defendant under the memorandum of deposit of shares.

(3) costs of this action to be jointly and severally borne by the first defendant, the second defendant, the fifth defendant, the sixth defendant and the seventh defendant.

[2] On 26 March 2021, I heard encl 57, reserved decision to 15 April 2021 and dismissed the application with costs. These are the reasons for the decision.

BACKGROUND

[3] The background facts as contained in the plaintiff's submission are generally not disputed and are reproduced.

[4] The first defendant is a wholly owned subsidiary of the second defendant.

[5] The second defendant formed various intermediate holding companies ('IHCs') which in turn are the registered and beneficial owners of 52% or more voting shares in each of six project companies.

[6] The third defendant is an IHC and was at all material times, wholly owned by the second defendant. The third defendant holds 52% ordinary shares as well as preference shares in each of three project companies namely Silverstar Pavilion Sdn Bhd, Corporate Season Sdn Bhd and Fortune 11 Sdn Bhd ('KLIA projects').

[7] The fourth defendant is a holding company that holds interest in non-KLIA projects.

[8] The fifth defendant is a director of the first defendant. The fifth and sixth defendants are both directors of the second to fourth defendants. The fifth and sixth defendants are the registered and beneficial owners of 100% of the voting rights in the second defendant and they effectively have management and/or conduct and/or control of the first defendant, the second defendant, the third defendant and the fourth defendant.

[9] The seventh defendant is a shareholder of the fourth defendant.

[10] The project companies are holders of feed-in approval granted by the sustainable energy development authority for various solar power generation projects in Malaysia.

[11] The project companies required equity funding for the purposes of the projects.

[12] The plaintiff provided the equity funding for the projects on the terms of the master investment agreement dated 27 March 2013 ('MIA') executed between the plaintiff and the first defendant as amended and restated on 26 November 2013 via a first supplemental agreement dated 25 November 2013 issued by the first defendant where:

(a) the plaintiff subscribed for note certificates to be issued by the first defendant under a multi-investment programme amounting to USD20.040m;

(b) the first defendant would then use the proceeds to subscribe for redeemable preference shares issued by the IHCs or grant loans to the IHCs; and

(c) the IHCs would in turn utilise the proceeds from the redeemable preference shares and/or loan to acquire economic rights in the project companies;

[13] The multi-investment programme serves to provide equity funding for the projects to be undertaken by the subsidiaries of the second defendant and the project companies.

[14] In return for subscribing for the note certificates:

(a) the second defendant signed a guarantee and indemnity in favour of the plaintiff dated 27 May 2013 which was amended and supplemented by the first supplemental deed dated 25 November 2013 and second supplemental deed dated 14 September 2016; and

(b) the fifth to seventh defendants executed memorandum of deposit of shares in respect of their respective shares in the second and fourth defendant in favour of the plaintiff.

[15] Via the memorandum of deposit of shares, the plaintiff has:

(a) security over all the ordinary shares of the second defendant and of the fourth defendant;

(b) indirect interest in the second defendant's 100% shareholding in the third defendant. The third defendant holds 52% ordinary shares in each of three project companies that in turn hold interest in the KLIA projects (Kuala Lumpur International Airport). The directors of the third defendant are the fifth and sixth defendants; and

(c) indirect interest in the fourth defendant's interests in several project companies (whether by way of direct shareholding, economic rights or redeemable preference shares) that hold the feed-in approval for solar power generation projects in Malaysia.

THE PLAINTIFF'S CLAIM

[16] The plaintiff claimed that the first defendant has breached its salient obligations under cll 6.3 and 18.17(c)(i) of the MIA as follows:

(a) committed a breach of the MIA to ensure that the second defendant is and shall remain the legal and beneficial owner of 100% of the ordinary voting share capital of the Relevant SunEnergy Intermediate Holding Company as defined under the master investment agreement by a wrongful dilution of the second defendant's shareholding in the third defendant from 100% to 1% contrary to cl 18.17(c)(i). In this regard, one of the Relevant SunEnergy Intermediate Holding Companies is the third defendant. The third defendant holds 52% ordinary shares in each of three project companies; and

(b) failed, neglected and/or refused to pay the instalment amount (as defined in cl 6.3(a)(iv) of the MIA) under the note certificates. In this regard, the instalment amount of USD3,161,795 was due and payable by the first defendant to the plaintiff on 30 June 2020.

Wrongful dilution of second defendant's shareholding in third defendant

[17] On or about 28 June 2020, the plaintiff discovered that on or about 3 June 2020, the management and/or persons having conduct and/or control of the third defendant, at all material times a 100% owned subsidiary of the second defendant, had caused to be issued 10,000 new shares in the third defendant in the name and for the benefit of the sixth defendant:

(a) the management and/or persons having conduct and/or control of the third defendant and the second defendant were at all times the fifth and sixth defendants in their capacity as the directors of both the third defendant and the second defendant. The fifth defendant is also a director of the first defendant;

(b) the issuance of these new shares in the third defendant was done without having first obtained the consent or approval of all relevant and/or interested parties including the plaintiff. In this regard, the plaintiff asserted that:

(i) the plaintiff does not have any nominee director appointed in the third defendant to represent the plaintiff's interest in the third defendant. The plaintiff could not have exercised control of the third defendant as only

A the fifth defendant and the sixth defendant are the directors of the third defendant;

(ii) whilst the plaintiff has a nominee director, Mr Levin Tan, appointed to the Board of Directors in the second defendant to represent the plaintiff's interest in the second defendant, Mr Levin Tan could not have exercised control of the second defendant as both the fifth defendant and the sixth defendant constitute the majority in the Board of Directors of the second defendant;

(iii) no notice was given to Mr Levin Tan on the aforesaid issuance of new shares in the third defendant in the name and for the benefit of the sixth defendant;

(iv) no resolutions were passed in the second defendant for the aforesaid issuance of new shares in the third defendant to the sixth defendant;

(v) no resolutions were passed in the second defendant for the aforesaid issuance of new shares in the third defendant to the sixth defendant; and

(vi) the plaintiff had on 29 June 2020 and on 2 July 2020, through Mr Levin Tan, notified the fifth defendant that the plaintiff has no knowledge of and does not approve the aforesaid issuance of new shares in the third defendant, and further requested for a board meeting and an audit of the said issuance of new shares in the third defendant.

[18] It was argued by the plaintiff that notwithstanding that the consent order dated 28 August 2020 in encl 35, where the said 10,000 new shares had been transferred from the sixth defendant to the second defendant, thereby reversing the said dilution, it does not obliterate the fact that at the material time there was a fundamental breach of the terms of the MIA in relation to the issuance of the said 10,000 new shares.

Failure to pay instalment amount to plaintiff

[19] By the first defendant's failure to pay to the plaintiff the instalment amount (as defined in cl 6.3(a)(iv) of the MIA) under the note certificates amounting to USD3,161,795 due and payable on 30 June 2020, the first defendant has breached cl 6.3(a) and 6.5(a) of the MIA. The first defendant's breaches constitute an event of default under cl 18.1 of the MIA.

[20] The plaintiff posited that as a result of the first defendant's aforesaid two breaches, the total outstanding amount due and owing by the first defendant together with Accrued PIK Interest pursuant to cl 6.3 of the MIA is USD25,600,347, particulars of which are as follows:

Description	Amount (USD)
Principal Outstanding Sum	16,352,600
Accrued PIK Interest Outstanding Sum	9,247,747
TOTAL OUTSTANDING SUM	25,600,347

[21] As for the claim against the second defendant, the plaintiff contended that:

(a) the issuance of the new shares in the third defendant and the first defendant's failure to pay the instalment amount had triggered the second defendant's obligations and/or liability under the guarantee and indemnity executed by the second defendant in favour of the plaintiff dated 27 May 2013 (which was amended and supplemented by the first supplemental deed dated 25 November 2013 and the second supplemental deed dated 14 September 2016) ('deed of guarantee and indemnity'):

(i) pursuant to cl 2(b) of the deed of guarantee and indemnity, the second defendant became immediately liable to pay the total outstanding instalment amount (as defined in the master investment agreement) to the plaintiff as if the second defendant is the principal obligor; and/or

(ii) pursuant to cl 10.1(a) of the deed of guarantee and indemnity, the second defendant shall indemnify the plaintiff against all losses, liabilities, damages, out of pocket costs and expenses (including legal fees) incurred by the plaintiff.

(b) as for the wrongful issuance of the new shares in the third defendant, the plaintiff claimed that the second defendant has breached its undertaking under the deed of guarantee and indemnity by:

(i) breach of cl 5.23(a)(ii) of the deed of guarantee and indemnity by failing to prevent the third defendant being the Relevant SunEnergy IHCs from ceasing to be the second defendant's wholly owned subsidiary; and

(ii) breach of cl 5.23(b) of the deed of guarantee and indemnity by failing to ensure that the second defendant remains the sole member of the third defendant and failure to ensure that the third defendant does not issue any share to any person other than the second defendant.

(c) in respect of the non-performance or non-observance of the second defendant's undertakings under the deed of guarantee and indemnity, pursuant to cl 10.1(a), the second defendant is liable to indemnify the plaintiff against all losses, liabilities, damages, out of pocket costs and expenses (including legal fees) incurred by the plaintiff.

[22] As for the claim against the fifth, sixth and seventh defendants:

(a) the plaintiff asserted that the issuance of the new shares in the third defendant and the first defendant's failure to pay the instalment amount has also triggered the obligation and/or liability of:

(i) both the fifth defendant and the sixth defendant under the respective memorandum of deposit of shares executed between them and the plaintiff in respect of their respective shares in the second defendant; and

(ii) both the fifth defendant and the seventh defendant under the memorandum of deposit of shares executed between them and the plaintiff in respect of their respective shares in the fourth defendant.

(b) the plaintiff contended that pursuant to the first defendant's failure to pay the instalment amount due to the plaintiff under the MIA, the fifth, sixth and seventh defendants are liable on the terms of the indemnity under cl 13.1 of the memorandum of deposit of shares to indemnify the plaintiff against all liabilities and costs incurred by the plaintiff;

(c) as regards the wrongful issuance of the new shares in the third defendant, the plaintiff asserts that the fifth and sixth defendants have breached their undertaking under the respective memorandum of deposit of shares, by causing or permitting to be done the said issuance of the new shares in the third defendant which had the effect of depreciating, jeopardising or otherwise prejudicing the value to the plaintiff of the second defendant's shares, in breach of cl 8(m) of the memorandum of deposit of shares; and

(d) due to the fifth and sixth defendants' above breaches, the plaintiff claimed that the fifth and sixth defendants are liable, on the terms of the indemnity in cl 13.1 of the memorandum of deposit of shares to indemnify the plaintiff against all liabilities and costs incurred by the plaintiff.

[23] On 3 July 2020, the plaintiff issued a letter to the first defendant notifying the first defendant of the aforesaid breaches and events of default under the MIA and that pursuant to cl 18.26 of the MIA, the commitment under the MIA is cancelled and the total outstanding instalment amount of USD25,600,347 as of 1 July 2020 is immediately due and payable by the first defendant to the plaintiff.

[24] Hence this suit filed by the plaintiff for the sum of USD25,600,347, cost and interest and the summary judgment application against the first, second, fifth, sixth and seventh defendants on the basis that they have no defence to the plaintiff's claim; specific performance of cl 3.7 of the respective memorandum of deposit of shares against the fifth, sixth and seventh

defendants to execute the share transfer forms within 14 days from the date of order regarding their respective shares in the second and fourth defendant to the plaintiff.

Defendant's case for opposing summary judgment

[25] In resisting summary judgment, the defendants' contentions in essence are:

(a) the memorandum of understanding dated 21 February 2017 ('MOU') had novated and/or varied the terms of the MIA:

(i) the plaintiff's claim in essence is that the defendants have breached the MIA by failing to make the instalment payment of USD3,161,795 which was due under the MIA on 30 June 2020;

(ii) the plaintiff's right to receive the sum of USD3,161,795 on 30 June 2020 was not a strict right under the MIA because:

(A) the MOU expressly deals with the repayment by the defendants of the plaintiff's investment under the MIA post June 2020;

(B) under cl 1.2 of the MOU, the plaintiff and the defendants were to come up with an exit plan to enable the defendants to pay its instalment to the plaintiff on 30 June 2020;

(C) it is the defendants' pleaded case that the plaintiff had deliberately refused to perform its obligations in breach of the MOU which led the defendants to default on its payment on 30 June 2020;

(D) the specific instances of the plaintiff's breaches of the MOU in brief are that the plaintiff unreasonably rejected the refinancing option by Maybank by refusing to exercise their call option increase to 48% and to take up the equity in the second or third defendant which caused the Maybank Facility for RM200m secured by the defendants to lapse and the plaintiff unreasonably refused to approve the sale of the KLIA assets to OCK Group Bhd ('OCK'). If the plaintiff had approved the sale at that time, the KLIA assets would have been sold for RM198m as opposed to the RM36,300,000 that it is now worth under the sale to Taliworks Renewables Sdn Bhd ('Taliworks');

(E) it therefore follows that the plaintiff's right to recover the sum of USD3,161,795 on 30 June 2020 is not a strict legal right as it was conditioned upon the plaintiff fulfilling its obligations under the MOU. This is precisely why the defendants take the position that the MOU had varied the MIA specifically in respect of the repayment clauses; and

(F) the plaintiff's rights under the MIA cannot be strictly enforced without taking into account its own breaches of the MIA as varied by the MOU otherwise the execution of the MOU would have been in vain.

(iii) a trial is necessary to determine, based on the examination of documentary and oral evidence, whether or not the plaintiff had in fact breached the MIA as varied by the MOU and whether by its own breaches of the same, had induced the defendants to breach the MIA; and

(iv) counsel for the defendants cited in support the cases of *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382 and *United Malayan Banking Corporation Berhad v Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1983] 1 MLJ 206.

(c) the dilution of shares referred to by the plaintiff at paras 25–29 of the statement of claim, even if it was a breach of the MIA can no longer constitute a breach as the dilution has been remedied by the consent order dated 28 August 2020 and subsequently by the order dated 8 January 2021. Further, the plaintiff has clearly suffered no damage from the dilution.

(d) the plaintiff is estopped by its conduct from seeking summary judgment based on the MIA as it is unconscionable for the plaintiff to insist on its strict legal rights under the MIA after the defendants had conducted its affairs in view of the agreement between the plaintiff and the defendants to sell the KLIA assets to Taliworks because:

(i) the defendants have performed its obligations under the MOU;

(ii) the plaintiff has extended time for performance of the MOU; and

(iii) the plaintiff has consented, indeed actively encouraged the defendants to sell the KLIA assets to Taliworks for RM36.3m. The defendants had taken steps to: (i) enter into a drag-along agreement, power of attorney and deed of assignment dated 27 November 2020 to sell the KLIA assets to Taliworks. The documentation for the sale has been completed and performance is on foot; (ii) ensure that the proceeds of the KLIA sale would be assigned to the plaintiff. The plaintiff will receive the proceeds from that sale. Those proceeds will necessarily set off any claim the plaintiff may have against the defendants;

(iv) on 8 January 2021, this court had also ordered the defendants to keep the plaintiff updated (on a fortnightly basis) on the status of the KLIA sale. The plaintiff is therefore fully aware that its entitlement to the RM36.3m is secured through the deed of assignment mentioned above;

(v) it would be wholly unconscionable and unjust for the plaintiff to insist on its strict legal rights under the MIA through its application for

summary judgment after inducing the Defendants into selling the KLIA assets to Taliworks for the benefit of the plaintiff. But for the ongoing negotiations between the plaintiff and the defendants, the defendants would not have sold the KLIA assets to Taliworks without first having its defence and counterclaim ventilated through a full trial and cited in support the cases of *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 (FC) and *Société Italo-Belge pour le Commerce et l'Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd The Post Chaser* [1982] 1 All ER 19.

(c) there is an unexplained delay in the plaintiff's filing of encl 57 — It is trite that an application for summary judgement must be made after an appearance has been entered and it could be made either before or after the delivery of defence provided that where it was made after the delivery of the defence, the plaintiff must explain the delay. If this explanation was not accepted by the court, no O 14 judgment could be signed. The defendants have suffered the following prejudices due to the Plaintiff's delay in filing its application in encl 57:

(i) the defendants have sold the KLIA Assets to Taliworks on 27.11.2020 in line with the plaintiff's requests and in line with ongoing settlement discussions; and

(ii) had the defendants known the plaintiff intended to file this application for summary judgment, the defendants would not have agreed to the KLIA sale for the benefit of the plaintiff without taking into account the plaintiff's liability to the defendants under the MIA as varied by the MOU.

The plaintiff's rebuttal

[26] The plaintiff in rebuttal in essence submitted that:

(a) the MOU was never intended to novate or vary the terms of the MIA, the MOU is not an agreement which is legally binding and relied on the case of *Kheamhuat Holdings Sdn Bhd v The Indian Association, Penang* [2006] 6 MLJ 656. The said MOU, according to the plaintiffs by its very text, was intended to be merely a plan for the fifth, sixth and seventh defendants to implement a strategy and possible avenues to amicably exit the relationship between the defendants and the plaintiff;

(b) the sale of the KLIA assets to Taliworks or indeed to any other party is one of the avenues or options for the defendant to partially repay the MIA facility. It does not provide an excuse for the defendants to avoid their contractual obligations;

(c) estoppel does not apply; and

(d) delay is no ground for defeating the plaintiff's right to summary judgment under O 14 when there is no real defence disclosed.

DECISION OF THIS COURT

[27] In deciding encl 57, it will be useful to recall the authoritative pronouncements of the Federal Court in *National Company For Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300:

> We think it appropriate to remind ourselves once again that in every application under Order 14 the first considerations are (1) whether the case comes within the Order and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding under Order 14. For the purposes of an application under Order 14 the preliminary requirements are:
>
> (i) the Defendant must have entered an appearance;
>
> (ii) the statement of claim must have been served on the defendant; and
>
> (iii) the affidavit in support of the application must comply with the requirements of Rule 2 of the Order 14.
>
> ... If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a prima facie case and he becomes entitled to judgment.

[28] The plaintiff in this case having satisfied the preliminary requirements that the O 14 application has been properly filed, the burden then shifts to the defendants to satisfy the court as to why judgment should not be given against them. It is useful to be reminded that in an O 14 of the Rules of Court 2012 application for summary judgment, the court must look at the matter as a whole and ask itself whether the defendants have satisfied the court that there is an issue or question in dispute which ought to be tried, or there ought for some other reason to be a trial of that claim or part of the claim.

[29] Where a defendant is able to demonstrate facts to show that he has raised a defence or reasonable grounds for setting up a defence or even a fair probability that he has a bona fide defence, he ought to be given leave to defend. This discretion lies with the judge.

[30] It is also to be borne in mind that the defendants must raise an arguable issue that requires a trial in order to determine it: *Voo Min En & Ors v Leong Chung Fatt* [1982] 2 MLJ 241.

[31] In *Bank Negara Malaysia v Mohd Ismail Ali Johor & Ors* [1992] 1 MLJ 400, the Supreme Court succinctly summarised the approach to be taken in dealing with the affidavits:

Under O 14 when a fact is asserted by one party and denied by another, and such denial is equivocal or lacking in precision or is inconsistent with undisputed contemporary documents or other statement by the same deponent or is inherently improbable in itself, the judge has a duty to reject such assertion or denial, thereby rendering the issue as not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially under an O 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under O 14. If the legal point is understood and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand' (see *Cow v Casey* 6 and *European Asian Bank AG v Punjab & Sind Bank* 7 at p 516.)

[32] I am also mindful of the principle governing the exercise of power under O 14 of the Rules of Court 2012 as stated in *Jacobs v Booth Distillery Co* [1901] 85 LT 262 where Halsbury LC observed:

People do not seem to understand that the effect of Order 14 is that, upon the allegation of the one side or the other, a man is not to be permitted to defend himself in court; that his rights are not to be litigated at all. There are something too plain for argument; and when there were pleas put in simply for the purpose of delay which only added to the expense, and where it was not in aid of justice that such things should continue, Order 14 was intended to put an end to that state of things, to prevent sham defences, from defeating the right of parties by delay, and at the same time causing great loss to the plaintiffs who were endeavouring to enforce their rights.

[33] In *Southern Finance Bhd (fomerly known as United Merchant Finance Bhd) v Sun City Development Sdn Bhd & Anor* [2006] 6 MLJ 673; [2006] 7 CLJ 464, it was held:

The general principle is where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has a bona fide defence he ought to be given leave to defend (*Saw v Hakim* 5 TLR 72). A defendant should not be shut out from defending unless it is very clear indeed that he has no case in the action under discussion (*Sheppards v Wilkinson* 6 TLR 13). The power to give summary judgment under O 14 is 'intended only to apply to cases where there is no reasonable doubt that a Plaintiff is entitled to judgment and where therefore it is inexpedient to allow a Defendant to defend for mere purposes of delay'. (*Jones v Stone* [1894] AC 122). Where there is any serious conflict to matters of fact or where any real difficulty as to matters of law arises, summary judgment under O 14 should not be granted. (*Electric and General Corpn v Thomson-Houston Electric* 10 TLR 103). But, however difficult the point of law is, once it is

A understood and the Court is satisfied that it is really unarguable it will give final judgment (*Cow v Casey* [1949] 1 KB 481). (See *Percetakan Solai Sdn Bhd v Kin Kwok Daily News Sdn Bhd & Anor* [1986] 1 MLJ 240 at p 243; [1985] CLJ Rep 632 at p 637).

B **[34]** Thus, for the defendants to succeed in being given leave to defend, they must convince this court that they have raised an issue of fact and/or law to be tried in this action and if they cannot, is there 'some other reason for trial' pursuant to O 14 r 3(1) of the ROC 2012?

C **[35]** I take firstly the point on whether delay defeats the summary judgment application. The answer has to be a resounding 'no!' based on my finding that there is no solid basis to this complaint of inordinate delay on the plaintiff's part in moving the court, and also premised on the Court of Appeal's D pronouncements in *Perkapalan Shamelin Jaya Sdn Bhd & Anor v Alpine Bulk Transport New York* [1997] 3 MLJ 818; [1998] 1 CLJ 424 (CA) which is plainly binding on this court:

> Delay in applying for O 14 is no ground for defeating the plaintiff's right to summary judgment under O 14 when there is no real defence disclosed.

E

[36] I move on to consider the other issues that were argued.

[37] As against the plaintiff's contention that the MIA was breached when F the second defendant's shareholding in the third defendant was diluted, the defendants' counsel strenuously argued that the plaintiff suffered no damage and 'the breach was remedied by the consent order dated 28.8.2020 and subsequently by the Order dated 8.1.2021'; he postulated that a breach remedied by consent no longer constitutes a breach. In my respectful view, whether the plaintiff can still rely on a breach of the MIA due to the dilution of G shares on the facts of the present case, is an issue of fact and law which should be decided at a full trial. After all, a consent order is akin to a contract with superadded command of the court: *Tan Geok Lan v La Kuan @ Lian Kuan* [2004] 3 MLJ 465. By dint of the consent order, in my opinion, it is triable whether the plaintiff is estopped from or entitled to resurrect the merits of the H said breach of the MIA that is entombed in the consent order.

[38] On the next issue raised by the defendants whether the MOU dated 21 February 2017 had novated and/or varied the terms of the master I investment agreement, I find that:

(a) the true nature and purport of the MOU ought to be determined at trial as parties are not just bound by the label affixed onto it. I find the case of *Kheamhuat Holdings* cited by the plaintiff's counsel to be distinguishable as enforceability of the MOU in that case, was only made after a full trial

and examination of evidence of witnesses. In my utmost respectful view, the circumstances disclosed in this case concerning the MOU calls for further investigation;

(b) I also found guidance in the case of *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* produced by the defendants, where in a judgment delivered by Lee Hun Hoe CJ (Borneo), it was held, inter alia, that the summary jurisdiction conferred by O 81, which provides a procedure similar to O 14, must be used with great care. In that case, just as in the present case, the defence had alleged not only a variation but also estoppel and in view of that it could not be said that liability for breach of contract had been clearly established and that unconditional leave to defend should be given. His Lordship said:

At p 387

> *The defence is that there is a variation as to the mode of acquisition of the land through the purchase of shares in the respondent company …*
>
> *It is the submission of the appellant that the matter of variation would require oral evidence. There are other issues that need to be tried. These cannot be ventilated through affidavit evidence alone. Further, because the appellant had been led to believe that there was variation in the mode of acquiring the property by the acquisition of shares the respondent could not insist strictly on legal rights under the original agreement without giving sufficient and reasonable notice.*

At p 390:

> The summary jurisdiction conferred by Order 81 must be used with great care. It provides a procedure similar to Order 14. Where all the issues are clear, summary judgment should be given. A defendant ought not to be shut out from defending unless it is very clear that he has no case in the action. A complete defence need not be shown. The defence set up need only show that there is a triable issue or question or that for some reason there ought to be a trial. *Here the defence is alleging not only variation but also estoppel which was not dealt with by the learned Judge. In view of this it could not be said that the liability for breach of contract had been clearly established. Accordingly, we would allow the appeal with costs and set aside the order of the learned Judge and give the appellant unconditional leave to defend. Deposit shall be refunded to the appellant*. (Counsel's emphasis.)

[39] Subject to the evidence to be adduced at the hearing of the triable issue whether the MOU had varied the MIA and whether the MOU is valid and answered in the affirmative, it may lead to a train of enquiry, for in the instant case, the defendants had also pleaded that the plaintiff has deliberately refused to perform its obligations in breach of the MOU by rejecting the refinancing option by Maybank via refusing to exercise its call option increase to 48% and to take up the equity in the second or third defendant which caused the Maybank facility for RM200m secured by the defendants to lapse, and that the

plaintiff also unreasonably refused to approve the sale of the KLIA assets to OCK Group Bhd ('OCK'). It is the defendants' case that if the plaintiff had approved the sale at that time, the KLIA assets would have been sold for RM198m as opposed to the RM36,300,000 under the sale to Taliworks which led the defendants to default on its payment on 30 June 2020. These assertions taken objectively, in my view, may well be relevant and warrant investigation at trial.

[40] Another issue raised by the defendants is whether estoppel applies and that it would be wholly unconscionable and unjust for the plaintiff to insist on its strict legal rights under the MIA through this application for summary judgment after allegedly inducing the defendants into selling the KLIA assets to Taliworks for the benefit of the plaintiff. It is the defendants' case that but for the ongoing negotiations between the plaintiff and the defendants, the defendants would not have sold the KLIA assets to Taliworks without first having its defence and counterclaim ventilated through a full trial. I find that at this stage, there is evidence to show that the defendants have with the plaintiff's approval, sold the KLIA assets to Taliworks and assigned the proceeds to the plaintiff but whether the sale of the KLIA assets and negotiations may have caused the defendants to be misled into believing a different state of affairs is triable.

[41] As for the claim against the fifth, sixth and seventh defendants, it is the plaintiff's case that upon the first defendant's failure to pay the instalment amount due to the plaintiff under the master investment agreement, the fifth, sixth and seventh defendants shall on the terms of the indemnity under cl 13.1 of the memorandum of deposit of shares indemnify the plaintiff against all liabilities and costs incurred by the plaintiff. As such, according to the plaintiff, the fifth, sixth and seventh defendants are jointly and severally for the sum of USD 25,600,347 to the plaintiff. Learned counsel for the defendants however had questioned the validity of this claim against fifth, sixth and seventh defendants. In my utmost respectful view, cl 13.1 of the memorandum of deposit of shares is not a stand alone clause and has to be construed together with the rest of the provisions in the memorandum of deposit.

[42] In *Aura Indah Jaya Sdn Bhd v OCBC Bank (M) Bhd* [2021] 10 MLJ 21; [2021] MLJU 191; [2021] 5 CLJ 24, I stated:

> [30] When looking at a contract, the court needs to:
>
> (i) consider the whole contract;
>
> (ii) give effect to every clause; and
>
> (iii) bring each clause into harmony with the other clauses.
>
> See — *City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd*

[1985] 1 MLJ 285; [1985] CLJ Rep 77; and *Lucy Wong Nyuk King (F) & Anor v Hwang Mee Hiong (F)* [2016] 3 MLJ 689.

[31] These principles were held by the Federal Court in *Lucy Wong Nyuk King (F) & Anor v Hwang Mee Hiong (F)* [2016] 3 MLJ 689 at p 700:

> [34] ... it is an established principle of construing a contract that, among others, a contract must be construed as a whole, in order to ascertain the true meaning of its several clauses, and also, so far as practicable, to give effect to every part of it. Each clause in an ordinary commercial contract should be so interpreted as to bring them into harmony with the other clauses of the contract (see *National Coal Board v Wm Neill & Son (St Helens) Ltd* [1984] 1 All ER 555 which was cited in *Royal Selangor Golf Club v Anglo-Oriental (M) Sdn Bhd* [1990] 2 MLJ 163; [1990] 3 CLJ Rep 37 and *Mulpha Pacific Sdn Bhd v Paramount Corp Bhd* [2003] 4 MLJ 357). In *Australian Broadcasting Commission v Australasian Performing Right Association Limited* (1973) 129 CLR 99, it was held that the whole of the contract has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another.
>
> [35] Professor McMeel in *The Construction of Contracts (Interpretation, Implication and Rectification)* (2nd Ed, 2011) explains in clear words this long-standing canon of construction at para 1.73 as follows:
>
> > Both the traditional and the modern approaches to construction stress the importance of having regard to the instrument as a whole. It is important not to fixate on one particular word or phrase and thereby neglect the overall purpose of the document or to give disproportionate importance to one phrase or clause. This is a long-standing rule.
>
> [36] As stated by Lewison in *The Interpretation of Contracts* (5th Ed) at para 7.02 that in order to arrive at the true interpretation of a document, a clause must not be considered in isolation, but must be considered in the context of the whole of the document. In *Chamber Colliery Co Ltd v Twyerould (1893)* [1915] 1 Ch 268n (which was cited by Lewison), Lord Watson said:
>
> > I find nothing in this case to oust the application of the well-known rule that a deed ought to be read as a whole, in order to ascertain the true meaning of its several clauses; and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed, if that interpretation does no violence to the meaning of which they are naturally susceptible.

[32] The Federal Court in a judgment delivered by Azahar Mohamed FCJ (CJM later) in the case of *Wong Yee Boon v Gainvest Builders (M) Sdn Bhd* [2020] 3 MLJ 571 had reiterated the principles in the *Lucy Wong Nyuk King* case.

[33] It is also trite that when interpreting the meaning of the words used in a contract they should be construed in their grammatical and ordinary meaning, except to the extent that some modification is necessary in order to avoid absurdity, inconsistency or repugnancy — *The Interpretation of Contracts by Kim Lewinson*; *Malaysian Newsprint Industries Sdn Bhd v Perdana Cigna Insurance*

Bhd & Ors [2008] 2 MLJ 256 (CA).

[34] It is also a basic rule in the law of contract that what have been agreed by contracting parties should be given effect to. The Federal Court in *Michael C Solle v United Malayan Banking Corporation* [1986] 1 MLJ 45 said as follows:

> The principles of construction to be applied to the undertaking are similar to those applied to an ordinary contract. The intentions of the parties are to be gathered from the language used. They are presumed to have intended what they said. The common and universal principle is that an agreement ought to receive that construction which its language will admit, which will best effectuate the intention of the parties, to be collected from the whole agreement.

[43] The memorandum of deposit as such, is to be read as a whole, and effect must be given to the clear intention and bargain made between the parties as contained therein.

(a) the salient parts of the memorandum of deposit of shares reads:

Clause 9 Enforcement of Security

9.1 *When Security becomes enforceable:* The Security hereby created shall immediately become enforceable upon the occurrence of an Event of Default under the Master Investment Agreement.'

9.2 *Power of Sale:* Upon the Security created under this Memorandum of Deposit becoming enforceable, it shall be lawful for the Investor, *at any time or times without further notice or consent or concurrence by the Chargor, to sell or dispose the Mortgaged Securities or any part thereof in such manner (including sale by private treaty) and at such price determined by the Investor at its sole and absolute discretion and upon such terms and conditions generally as the Investor shall in its discretion think fit*. Any dividends, interest or other payments which may be received or receivable by the Investor or its nominee(s) or agent(s) in respect of any Mortgaged Securities may be applied by the Investor as though they were proceeds of the sale'

'Clause 13 Indemnity

13.1 Indemnity: The Chargor hereby agrees with the Investor to indemnify the Investor against all liabilities, costs, charges and expenses (including any Tax liability and, in each case, value added tax, service tax charged or chargeable in respect thereof) incurred by the Investor or in consequence of:-

(i) the execution or purported execution or non-execution of the rights, trust, powers, authorities, discretions and obligations vested in it under this Memorandum of Deposit including but not limited to those relating to all actions, proceedings, claims and demands in respect of any matter or thing done or omitted in any way relating to this Memorandum of Deposit;

(ii) any failure by the Chargor to comply with its obligations to the

Investor hereunder or otherwise in connection herewith; and

(iii) any payment in respect of the Secured Obligations (whether made by the Chargor or a third person) being impeached or declared void for any reason whatsoever.'

Clause 2 Covenant to pay

2.1 Covenant to pay: In consideration of the Investor agreeing, at the request of the Chargor, to make available the Multi-Investment Programme to the Issuer upon the terms and subject to the conditions set out in the Master Investment Agreement, the Chargor covenants with the Investor that it will duly and punctually pay or discharge to the Investor the Secured Obligations in accordance with the provisions of the Transaction Documents *provided that the liability of the Chargor to the Investor is limited to the value of and shall only be satisfied from the Mortgaged Securities.*

(b) on my reading of the above provisions in harmony with each other, it will appear that the true nature of the memorandum of deposits as to whether the obligations imposed constitute an indemnity or that of a guarantee so as to make the fifth, sixth and seventh defendants jointly and severally with the first and second defendants for the sum of USD25,600,347s posited by the plaintiff, is not plain, and to be established at trial. Clause 2.2 in clear words do say 'the liability of the Chargor to the Investor is limited to the value of and shall only be satisfied from the Mortgaged Securities'.

[44] In my judgment, for the reasons enumerated above, this is not such a plain and straightforward case for summary judgment to be entered. The defendants in my view, have succeeded to achieve the relatively low threshold to resist summary judgment as they need only raise one triable issue to be given leave to defend — *South East Asia Insurance Bhd v Kerajaan Malaysia* [1996] MLJU 642; [1998] 1 CLJ 1045.

[45] Even if I am wrong on the above findings, having considered anxiously all the circumstances of the case and the relevant evidence adduced and viewed against the background of the events that had transpired right up to the hearing of encl 57, I am satisfied that there are circumstances here that constitute there is 'some other reason for trial' within the scope of O 14 r 3(1), which is in pari materia with the English RSC 1965, O 14 r 3, and these words 'some other reason for trial' was explained in *Miles v Bull* [1968] 3 All ER 632, pp 637–638 by Megarry J:

Under r. 3 and r. 4 of the present R.S.C., Ord. 14, the Defendant can obtain leave to defend if (and I read (13) from r. 3(1)) the Defendant satisfies the court 'that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial'. *These last words seem to me to be very wide*. They also seem to me to have special significance where (as here) most or all of the relevant

A facts are under the control of the plaintiff, and the Defendant would have to seek to elicit by discovery, interrogatories and cross-examination those which will aid her. *If the Defendant cannot point to a specific issue which ought to be tried, but nevertheless satisfied the court that there are circumstances that ought to be investigated, then I think those concluding words are invoked.* There are cases when the plaintiff ought to be put to strict proof of his claim, and exposed to the full investigation possible at a trial; and in such cases it would, in my judgment, be wrong to enter summary judgment for the plaintiff. In the present case the plaintiff's evidence initially consisted of a single affidavit in which brevity could scarcely be carried further. He has now amplified this by further evidence, but this is certainly not exhaustive or conclusive. The words 'there ought for some other reason to be a trial' seem to me to give the court adequate powers to confine R.S.C., Ord. 14, to being a good servant and prevent it from being a bad master. If I may adapt the language of LORD PARKER OF WADDINGTON in *Daimler Co., Ltd v. Continental Tyre and Rubber Co. (Great Britain), Ltd*. (14), referred to in the notes to R.S.C., Ord. 14, in THE SUPREME COURT PRACTICE 1967 (15), *if the circumstances of the case are 'such as to require close investigation', this will 'preclude the propriety of giving leave to sign judgment under Ord. 14, r. 1'*. The question is thus whether this is such a case ...

There is here a case for investigation, and so not for summary decision.

I also bear in mind what BRAMWELL, L.J., said in *Harrison v. Bottenheim* (16). Even on the old wording of R.S.C., Ord. 14,

> *though a man cannot show a defence, still, if he has shown enough to entitle him to interrogate the Plaintiff, the case is not within Ord. 14, and should not be pursued without his being allowed to defend*. (Emphasis added.)

[46] On the totality of the evidence before this court, I take the view that the issues raised by the defendants require close investigation, and in the interest of justice, this is a fit and proper case for which there ought to be a trial to determine the plaintiff's claim.

[47] Enclosure 57 is accordingly dismissed with costs of RM5,000; costs being subject to allocator.

Application dismissed with costs.

Reported by Rafinie Ramli